IN THE

Supreme Court of the United States

October Term, 1977
No. 77-293

EZRA KULKO,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO; and SHARON KULKO HORN,

Appellees.

On Appeal From the Supreme Court of the State of California.

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE.

OPINIONS BELOW.

The opinion of the California Supreme Court is reported at 19 Cal.3d 514, 138 Cal.Rptr. 586, 564 P.2d 353.

The opinion of the California Court of Appeal, 133 Cal.Rptr. 627, was vacated and rendered a nullity when the California Supreme Court granted a hearing. (6 Witkin, *California Procedure* (2d ed. 1971), Appeal, §617, pp. 4540-4541.)

I

JURISDICTION.

(1) Jurisdiction by Appeal Has Not Been Invoked Because No Statute Was Explicitly Challenged or Upheld.

Appellant[1] seeks to invoke appeal jurisdiction, 28 U.S.C., §1257(2), for review of a judgment exercising jurisdiction over him under California's long-arm statute.

Review by appeal is not available, however, because there was never an explicit constitutional attack upon the validity of California Code of Civil Procedure section 410.10, on its face or as applied. The constitutionality of a state statute must be expressly drawn

---

[1] *Matters of Form.*

Appellant, defendant below, is Ezra Kulko, a dentist. He is referred to as Dr. Kulko, or as appellant, or as the father of the children whose welfare is the subject of this action.

Appellee, plaintiff below, is Sharon Kulko Horn, Dr. Kulko's former wife. She is referred to as Mrs. Horn, or as appellee, or as the mother of the children whose custodial care and support is the subject matter of this case.

The Superior Court of the State of California in and for the City and County of San Francisco was respondent below only because the action was an original proceeding for a writ of mandate. The court never appeared below or here and is not mentioned as a party.

"J.S." refers to the Jurisdictional Statement.

"J.S., App." refers to the Appendix to the Jurisdictional Statement.

"A." refers to the printed Appendix.

"Brf. A." refers to the Brief for Appellant.

"Record" refers to the Record certified to this Court.

"Stay App." refers to Appellant's Application to Stay Enforcement of Order of the Superior Court of the State of California in and for the City and County of San Francisco, previously filed herein.

"Documents" refers to the documents of the Superior Court filed in this Court contemporaneously with the filing of the Brief for Appellee in connection with appellee's suggestion that the case is moot. Documents are listed below at footnote 2.

in issue; assertion of a right, privilege, or immunity under the Constitution is not enough. Furthermore, the validity of the statute must be upheld. *Raley v. Ohio*, 360 U.S. 423, 434-435 (1959); *Commonwealth Bank of Kentucky v. Griffith*, 14 Pet. 56 (1840).

> "It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws."
>
> *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U.S. 182, 185 (1945).

While appellant now contends that the constitutionality of the statute as applied was challenged and upheld [Brf. A., pp. 2-3], the California Supreme Court was concerned only with whether Dr. Kulko, as an individual, had sufficient contacts with California to make it reasonable to maintain the action there. The constitutionality of the statute was never ruled upon. [J.S., App. A, pp. xi-xiii.]

Neither did appellant raise the statute in the California courts.

In the Superior Court, his motion to quash the summons was made solely on the "ground that this Court lacks personal jurisdiction over him in that he is a nonresident who does not have sufficient contact with California to satisfy due process requirements." [A. 21, 37.]

Appellant's petition for a writ of mandate sought review of the Superior Court's denial of the motion upon the same grounds. [A. 34-39.]

In his petition for hearing to the California Supreme Court, appellant contended only that he did not have

minimum contacts with California and that an exercise of jurisdiction deprived him of due process "in that he is not afforded a reasonable opportunity to be heard." Again, no claim was made that the California statute is unconstitutional. [Record: Petition for Hearing, pp. 2, 5.]

Thus, the statute was not mentioned until this Court. [J.S., p. 4.] Appellant's claims to a right, privilege, or immunity personal to him must be reviewed by certiorari, if at all. Appeal does not lie. *Hanson v. Denckla*, 357 U.S. 235, 244, n. 4 (1958).

Note, too, that the Questions Presented in the Brief for Appellant [p. 5] seem to change the issues from the one in the Jurisdictional Statement which challenged construction of the statute [p. 4], and do not explicitly draw the statute into issue. Rather, appellant now wants review of whether his "acquiescing" to his children and his "acts . . . which determine(d) his child's future place of residence . . ." are acts which subject him to California's jurisdiction. These questions may be determined without reaching the constitutionality of the statute.

Appellant's confusion of the issues may be a result of the wording of the statute he now wants examined: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Proc., §410.10. But a claim that a personal right has been infringed is not a coextensive attack on the statute. If it were, every case upholding an exercise of jurisdiction under similar statutes, which several states have enacted, would result in a judgment appealable to this Court, each testing the outer limits of

due process. *Cf.*, Mr. Justice Brennan, concurring and dissenting, *Shaffer v. Heitner*, No. 75-1812 (June 24, 1977), Slip Opinion, p. 2, n. 1.

Moreover, appellant could have framed a challenge to the statute, on its face or as applied. For instance, he might have contended it was too vague and did not give adequate notice of what contacts might result in jurisdiction. *Cf.*, Mr. Justice Stevens, concurring, *Shaffer v. Heitner*, Slip Opinion. Or he could have complained that he had been subjected to shifting standards or to retroactive application of a new test; or that this application of the statute impaired obligations of a contract. Whether those claims would be valid is another question, but attacks on the statute could have been framed; they were not.

Thus, the California Supreme Court did not interpret its statute, as it had not been placed in issue, but construed the federal Constitution. Even here appellant does not argue the statute itself is unconstitutional, but rather contends only that his contacts are not sufficient under *Hanson v. Denckla*. [Brf. A., pp. 4, 11-27.]

The appeal should be dismissed for lack of jurisdiction.

(2) Review Is Not Appropriate Because This Peculiar Combination of Events Does Not Clearly Raise Recurring Issues of National Importance.

The appropriateness of exercising jurisdiction over this father must be determined on the basis of all the facts and circumstances involved in the relationships between these parties, their children, child support and child custody, and California. This action resulted from

an unusual series of dealings in a continuous course of conduct not likely to recur:

> At the time of the divorce settlement the wife lived in California; she was to have legal custody in California part of each year; she was to receive child support payments in California; the father was seriously in arrears as to child support at the time the action was started; two years before the action was started, the father sent the 11-year-old daughter to live in California permanently; the father used a California public agency to investigate the living conditions before deciding the 14-year-old son should live in California, too; the father agreed in writing to modify the original agreement so both children could live in California; the father agreed to increase child support payable in California, leaving open only the amount to be paid; the father concedes jurisdiction over child custody which is raised in the same complaint; jurisdiction over child custody is appropriate under established standards of custody jurisdiction; correspondence and telephone calls were sent to and from California to investigate and negotiate the modification; the original judgment is of a foreign country which no longer has any interest in the case; there is no judgment in the state of defendant's residence which was the state of the marital domicile; and, altogether, there has been a long, continuous course of relationships with California residents regarding the subject of the suit: the children.

The case does not present the isolated issues appellant argues despite his efforts to fragment the case and treat the facts independently. He raises a series of

hypotheticals based on component facts and argues their supposed consequences, focusing on the separate elements of his relationship instead of the actual combination of facts. For instance, he asks: What if a father with just visitation rights had merely permitted the mother with legal custody to take the children from the original jurisdiction (Haiti?)? [Brf. A., p. 25, c. 1.] (The significance of that question could well depend on whether there had been an order restraining her from removing the children.) What if the child had been sent for visitation only? [Brf. A., p. 22.] What if only the original divorce agreement were involved? [Brf. A., pp. 16-17, 23, 26, 27.] What if Mrs. Horn were forum shopping? [Brf. A., pp. 25-26.] Must not a defendant have specific intent to confer jurisdiction? [Brf. A., pp. 16-17, 21 ¶3.] But the elements cannot be treated separately, they occurred together.

Little will be gained from a review of the other propositions appellant seemingly asks this Court to adopt: (1). "Contacts" means physical presence in the forum state [Brf. A., pp. 14-16] because of the continued "soundness and conceptual structure" of *Pennoyer v. Neff*, 95 U.S. 714 (1877) with its territorial limitations on the power of states [Brf. A., pp. 11-12, 17-18]; (2). Jurisdiction should be much more restricted in child support proceedings than in other legal relationships [Brf. A., pp. 17-18]; (3). Transactions affecting children are of less consequence than commercial transactions [Brf. A., pp. 15, 16-18, 19-21]; and (4). Mothers and children should be left to their own devices to negotiate the personal matters of custody and support with the father without "inter-

ference" from courts by the exercise of long-arm jurisdiction. [Brf. A., pp. 13, 18, 26.]

The other issue appellant raised, possible interference with interstate visitation, which he advanced as a major policy question to be reviewed [J.S., pp. 18, 24-25], is not argued in his brief. Rather, he equates permanent custody to temporary visitation [Brf. A., p. 22], and contends long-arm jurisdiction should not apply to family law. [Brf. A., pp. 13, 18, 26].

Consequently, no major issues are presented. Only the parties will be affected by review of this unique case which does not present clear issues of national import. *Cf.*, U.S. Supreme Ct. Rule 19(1); *Kimbrough v. United States,* 364 U.S. 661 (1961). As presented, without constitutionality of a statute in issue, the cause does not merit review by appeal or by certiorari.

(3) This Court Has Been Deprived of Jurisdiction of the Case Because Appellant's Attack on Jurisdiction Over Him Was Rendered Moot by His General Appearance.

Appellant challenges an exercise of jurisdiction over him by California in an action to establish a Haitian divorce decree as a foreign judgment in California so child custody may be awarded to appellee and appellant's child support obligation may be increased. Appellee also seeks arrearages of child support due under the Haitian decree. [A. 3-8.]

Appellant moved to quash the summons pursuant to California Code of Civil Procedure section 418.10. [Appendix to this Brief.] When the California Superior Court denied his motion, appellant sought review by the speedy statutory remedy of a petition for a writ

of mandate. The California Supreme Court affirmed by an opinion filed May 26, 1977 which became final as to California courts on June 25, 1977. [Brf. A., p. 2.] Notice of appeal was filed August 3, 1977. [A. 2.]

Appellant did not seek a stay of the issuance of the remittitur from the California Supreme Court, Cal. Rules of Court, rule 25, and jurisdiction reinvested in the Superior Court. Appellee then filed a motion asking for child support, attorney fees, and costs pending trial on the merits of the complaint, and asked the court to set the arrearages due under the Haitian decree. [Documents: Motion.][2]

In response, appellant filed two documents. One was a written response to appellee's motion labeled "by special appearance only" in which he asked "pend-

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[2]*Documents Lodged.*
Certified copies of the following documents of the California Superior Court in and for the City and County of San Francisco have been submitted herewith for consideration of this issue:

(1) Notice of Motion (Marriage) to Set Arrearages and to Increase Child Support.
(2) Responsive Declaration re Notice of Motion by Special Appearance Only.
(3) Notice of Motion and Motion to Continue Hearing (By Special Appearance Only).
(4) Minute Order of August 30, 1977.
(5) Order Increasing Child Support, Determining Arrearages, and for Attorney Fees on Account (also Brf. A., Appendix).
(6) Declaration of Judge of the Superior Court, filed September 20, 1977.
(7) Reporter's Transcript of proceedings of August 30, 1977.

Also relevant is a letter to the Honorable Donald B. King, Judge of the California Superior Court, dated September 8, 1977, submitted by appellant's counsel in support of appellant's request that the motion be continued, stayed, or denied. This letter was not in the Superior Court file when certified copies were requested, but a copy of the letter was previously filed in this Court by appellant. [Stay App., Ex. B.]

ing final Appeal herein that said motion should be denied without prejudice, continued, or stayed." The other was a written "Notice of Motion and Motion to Continue Hearing (By Special Appearance Only)" in which he moved for a continuance of the hearing of the motion pending determination of the proceedings in this Court. [Documents.]

Appellant's counsel did not attend the August 30, 1977 hearing, but communicated with the judge to request leave to submit additional arguments in support of his position. [Documents: Reporter's Transcript, p. 1.] Appellant's counsel submitted a letter dated September 8, 1977 in which he stated, *inter alia*:

> "(2) My investigation reveals that a stay of proceedings in the trial court remains in the discretion of that court; i.e., yourself, while the appeal is pending in the United States Supreme Court. * * *"
>
> ."(3) It is my view that the response filed by myself to Mrs. Thorn's motion places before yourself the option of granting a stay, continuance, etc., and accordingly that the matter presently rests with yourself for determination, unless it would be your view that a totally separate motion should be filed by myself affirmatively requesting a stay. * * *"
>
> [Stay App., Ex. B.]

The California Superior Court determined it had jurisdiction to hear appellee's requests, denied appellant's motion to continue, denied a stay, and refused to dismiss the motion. Relief was granted as prayed, including fixing arrearages due under the Haitian decree

as requested in the complaint. [Documents; Brf. A., Appendix, pp. i-iii.]

Appellant applied directly to this Court for a stay of the Superior Court order. [Stay App.] Stay was denied by Mr. Justice Rehnquist for failure to comply with Supreme Court Rule 18(2).

Unless there is a case or controversy at all stages of the proceedings, this Court does not have jurisdiction. U.S. Const., Art. III; *Steffel v. Thompson,* 415 U.S. 452, 459, n. 10 (1974); *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n. 3 (1964). By California law and accepted common law principles, appellant has made a general appearance, submitting to jurisdiction, and rendering his jurisdictional challenge moot.

California Code of Civil Procedure section 418.10 gave appellant a clear and expeditious way to challenge personal jurisdiction before pleading, a means he pursued.[8] When the California Supreme Court ruled against him and he decided to ask this Court for relief, however,

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[8]For instance, he could have used interrogatories on the jurisdiction issue, *cf., The 1880 Corporation v. Superior Court,* 57 Cal.2d 840, 22 Cal.Rptr. 209, 371 P.2d 985 (1962), although not interrogatories on the merits, *Chitwood v. County of Los Angeles,* 14 Cal.App.3d 522, 92 Cal.Rptr. 441 (1971); made a peremptory challenge to a judge for believed prejudice, *Loftin v. Superior Court,* 19 Cal.App.3d 577, 97 Cal.Rptr. 215 (1971), though not a challenge for cause which would require a hearing, *Donovan v. Superior Court,* 39 Cal.2d 848, 250 P.2d 246 (1952); challenged subject matter jurisdiction at the same time he challenged personal jurisdiction, *Goodwine v. Superior Court,* 63 Cal.2d 481, 47 Cal.Rptr. 201 (1965); moved to dismiss for inconvenient forum, Cal. Code Civ. Proc., §418.10; attacked an attachment, *Fount Wip, Inc. v. Golstein,* 33 Cal.App.3d 184, 108 Cal.Rptr. 732 (1973), and generally pursued any statutory rights, *cf., Berard Const. Co. v. Municipal Court,* 49 Cal.App.3d 710, 122 Cal.Rptr. 825 (1975). There is no personal appearance as long as the court is not asked to exercise its discretion on the merits.

he did not avail himself of clear remedies to stay the issuance of the remittitur and prevent the Superior Court from proceeding on the complaint. Cal. Rules Ct., rule 25, subds. (c), (d).

A stay of the remittitur ordinarily is granted to allow a party to seek a hearing here. *Cf., Reynolds v. E. Clemens Horst Co.*, 36 Cal.App. 529, 172 Pac. 623 (1918) (stay to allow a nonresident defendant to pursue an attack on the exercise of personal jurisdiction to this Court); *California Civil Appellate Practice* (Cont.Ed.Bar 1966), §15.100, p. 544. But, by failing to move for a stay of the issuance of the remittitur (or filing of the opinion in writ proceedings, see *California Civil Writs* (Cont.Ed.Bar 1970), §17.30, p. 420), appellant allowed the Superior Court to reacquire jurisdiction to proceed on the merits. Cal. Code Civ. Proc., §418.10 (default could be taken); *California Civil Writs* (Cont.Ed.Bar 1970), §21.27; 6 Witkin, *California Procedure* (2d ed. 1971), Appeal, §518. Thus, appellant was subject to the Superior Court's plenary jurisdiction when he elected to ask for an exercise of discretion in his favor.

Appellant recognizes an appearance going to the merits subjects him to jurisdiction. [Brf. A., pp. 3, 4.] Apparently, however, he does not realize that labeling his papers "special appearance only" had no legal effect; the relief requested governs the nature of the appearance.[4] If a party asks for any relief which could

[4]By the same token, the recitals in the order regarding the appearance of Mrs. Horn with her atttorney and appellant's special appearance by counsel do not control. The recitals are neither findings nor part of the judgment. *Green v. Swift*, 50 Cal. 454, 455 (1875); *Jacobs v. Norwich Union Fire Ins. Soc.*, 4 Cal.App.2d 1, 4-5, 40 P.2d 899, 901 (1935); 32 Cal.Jur.2d, Judgments, §72.

be given only on the basis that he is a party and that the court has jurisdiction to exercise its discretion, he has made a general appearance. *In re Clarke*, 125 Cal. 388, 392-393, 58 Pac. 22, 23 (1899); *Slaybaugh v. Superior Court*, 70 Cal.App.3d 216, 221-223, 138 Cal.Rptr. 628, 631-633 (1977); *Davis v. Davis*, 305 U.S. 32, 42-43 (1938); *see, Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 442 (CA3 1971), *cert. denied*, 405 U.S. 1017 (1972); Restatement (Second), Conflict of Laws §§32, comment d, 33, comments a, b, d, g.

Appellant wanted a continuance or a stay of appellee's motion which had asked for a partial determination of the merits of the complaint by requesting an order fixing the arrearages due under the Haitian decree, the subject of the main action. Effectively, this sought an extension of time to plead to the complaint because Dr. Kulko then was subject to a default judgment if he did not plead. Cal. Code Civ. Proc., §418.10.

It is settled that a request for a continuance to plead to the merits is a general appearance. *Zobel v. Zobel*, 151 Cal. 98, 101, 90 Pac. 191, 192 (1907) (written motion to continue is a personal appearance); *Knoff v. City and County of San Francisco*, 1 Cal. App.3d 184, 201, 81 Cal.Rptr. 683, 694 (1969); *Davis v. Davis*, 305 U.S. 32, 43 (1938). As long as appellant followed the well-defined procedures available to him, he was protected from actions by appellee. Once he stopped following those procedures, he became subject to the general rules of civil procedure. The request for continuance was, itself, a general appearance.

Appellant also made a general appearance by asking for a denial of the motion which, if granted, would have deprived appellee of interim child support and attorney fees and delayed the judgment for arrearages. One who asks for discretionary relief makes a general appearance. *Lacey v. Bertone,* 33 Cal.2d 649, 203 P.2d 755 (1949); *Remsberg v. Hackney Manufacturing Co.,* 174 Cal. 799, 164 Pac. 792 (1917); *see, Greene v. Committee of Bar Examiners,* 4 Cal.3d 189, 200, n. 6, 93 Cal.Rptr. 24, 31, n. 6, 480 P.2d 976, 983, n. 6 (1971); 1 Witkin, *California Procedure* (2d ed. 1970), Jurisdiction, §130, p. 659. Not only did appellant seek discretionary relief, the letter to Judge King expressed his counsel's considered opinion that the Superior Court had jurisdiction to act.

Additionally, appellee's request for pendente lite relief was a provisional remedy, *In re Marriage of Skelley,* 18 Cal.3d 365, 134 Cal.Rptr. 197, 556 P.2d 297 (1976), and participation in a proceeding for a provisional remedy is a general appearance, *see,* 1 Witkin, *California Procedure* (2d ed. 1970), Jurisdiction, §129, pp. 657-659, and cases collected, as is participation in other ancillary proceedings, especially when the participation goes to the merits of the relief sought. *Cf., Miller v. Miller,* 57 Cal.App.2d 354, 134 P.2d 292 (1943); *MacPherson v. Superior Court,* 22 Cal.App.2d 425, 430-431, 71 P.2d 91, 94-95 (1937). When a written motion to continue is combined with a separate written request to continue, stay the hearing, or deny a motion addressing both the merits and ancillary remedies, there clearly has been a general appearance.

The general appearance was made before judgment on the complaint and even an appearance after judgment cures any previous defects in personal jurisdiction. *Farmers & Merchants Nat. Bank v. Superior Court,* 25 Cal.2d 842, 155 P.2d 823 (1945), *see, Fount Wip, Inc. v. Golstein,* 33 Cal.App.3d 184, 190, 108 Cal.Rptr. 732, 736 (1973), *cf., Adam v. Saenger,* 303 U.S. 59, 67-68 (1938). Surely, any defects in the original service of summons have been overcome.

Unlike some state procedures which purport to make a general appearance out of an attempt to challenge personal jurisdiction, *cf., Michigan Central Railroad Co. v. Mix,* 278 U.S. 492 (1929); *Harkness v. Hyde,* 98 U.S. 476 (1878), California procedures set no traps for appellant; he is bound to follow state rules. *Richardson Machinery Co. v. Scott,* 276 U.S. 128, 132-133 (1928); *cf., Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522, 524-526 (1931).

Failure to comply with state rules of practice often prevents this Court from considering a federal claim. *American Surety Co. v. Baldwin,* 287 U.S. 156, 168-169, n. 6 (1932). Settled rules require a party to follow local procedure and to limit his "special" appearances to attacks on jurisdiction. Appellant had a fair day in court but elected to address the merits; he does not deserve another day.

This appeal is moot.

II

MERITS.

Question Presented.

In an action to establish a Haitian divorce decree as a foreign judgment in California so the mother can modify the child custody and child support provisions and collect child support arrearages, is it reasonable to require the father, a New York resident, to

litigate child support in California when: the original agreement provided for custody of both children in California with the mother part of the year and required year-round child support payments in California; the father sent the 11-year-old daughter to live permanently with the mother two years before the instant action was commenced; the father decided the 14-year-old son should live with his mother after having a California public agency investigate; the father agreed to increase child support in an unspecified amount; the father concedes jurisdiction over child custody; and the father is seriously in arrears in agreed-upon child support?

Statement of the Case.[5]

Dr. Kulko and his wife agreed to obtain a divorce and entered into a written settlement agreement in 1972. [A. 8-12.] At the time, as recited in the agreement, she lived in California and he lived in New York, where they respectively still reside. [A. 8-12.] They agreed she would obtain a Haitian divorce, which she did. [A. 13-16.] Until the present action, neither party has ever attempted to establish the foreign judgment in any state of the United States. [Brf. A., p. 7.]

The agreement provided that Dr. Kulko would have custody of the two minor children, Ilsa, born July 10, 1962, and Darwin, born June 23, 1961, in New

[5]The minor variations in the evidence, primarily regarding arrearages in child support, when Ilsa moved to California, and the conclusionary allegation the children were "induced" by their mother, are stated in the light most favorable to Mrs. Horn, the prevailing party below, in accordance with established standards of review. [J.S., App. A, p. ii, n. 1]; *cf., Evco v. Jones,* 409 U.S. 91, 94 (1972). A complete statement of the case has been made because appellant's version omits material facts.

York for nine months each year. Mrs. Kulko, now Mrs. Horn, was to have legal care, custody, and control of both children in California for three months each summer, plus other holiday periods. [A. 9-10.]

Dr. Kulko agreed to pay support for the children while they were with their mother in California. He was to pay $3,000 annually, payable in six installments at her address in San Francisco. In addition, he was to pay all obligations incurred on behalf of the children for education, clothing, medical, hospital and dental expense. [A. 10.] As of May, 1976, Dr. Kulko was in arrears for child support under the agreement in the amount of $12,900 [A. 33] and as of September 8, 1977, $17,800. [Brf. A., App., p. iii.]

In December, 1973, the youngest child, Ilsa, then 11 years old, told her father she wanted to live with her mother in California. When he sent her to California for the mother's holiday custody period, he bought Ilsa a one-way airplane ticket and sent all of her clothing with her. The daughter continued to live with her mother in California and still lives with her. Since moving, the daughter has gone to New York to visit her father during the summers of 1974 and 1975, returning to her mother each time via airplane tickets purchased by her father. The record does not show any attempt by the father to keep her in New York or to get her to return to live with him. [A. 32.]

In January, 1976, after being with his mother for Christmas, the parties' son, Darwin, then 14 years old, called his mother and said he was in trouble because his father no longer wanted him. He asked permission to live with his mother, as he had said he wanted

to do for some time. Mrs. Horn sent Darwin an airplane ticket and he came to California without his father's knowledge. After he arrived, the mother called Dr. Kulko to inform him Darwin was in California. [A. 32-33.]

After the son came to California, the father contacted the Department of Social Services of the City of San Francisco. A representative of that California public agency contacted Mrs. Horn and both children and reported to the father. He decided the children should live with their mother, writing as follows:

"Dear Sharon

Darwin has informed me of his intention of living with you. I am prepared to accept his decision. The only question in my mind is the way his decision was reached. He has become angry, beligerant [sic] & unlikeable. I can only attribute it to distortion of reality based upon information fed to him in a biased way. Because of this, my quiet gentle loveable child threatened me to do violence to Dominique.

I don't want a human being around me with this type of behavior pattern. You are welcome to it.

I would have hoped that our relationship was going to improve. I feel at this point it is unfeasable [sic].

I would like to renegotiate the original agreement with you in as much as it is invalidated.

I would like for you to present to me what you feel would be a fair & equitable arrangement.

I would like to do it without lawyers as you know how I feel about them.

As always

Ezra" [A. 44-45; Record.]

On February 25, 1976, Mrs. Horn filed a complaint to establish the Haitian judgment as a foreign judgment in California, to modify custody and child support and collect support arrearages. [A. 3.] Dr. Kulko was served personally in New York in accordance with the California Code of Civil Procedure. [A. 18-19.] He moved to quash service of the summons on the grounds that he does not have sufficient contacts with California to maintain the action. [A. 20.]

He does not claim there was a lack of service, nor that the California rules are not calculated to give reasonable notice, nor that the California rules were not followed.

Neither does he contest California's jurisdiction to determine child custody, having conceded jurisdiction to determine custody of Ilsa and Darwin. [J.S., App. A, p. iv; J.S., App. B, p. xx.]

The trial court resolved all facts necessary to find jurisdiction in favor of the mother and children and against the father [J.S., App. A, p. ii, n. 1] and denied the motion to quash. [J.S., App. C, p. xxiii.]

The California Supreme Court affirmed as to Ilsa on the grounds that Dr. Kulko had purposely caused an effect in California and invoked the benefits and protections of that state by deciding to permit her to live with her mother and by sending her there. [J.S., App. A, pp. vii, xi.] As to Darwin, the court saw no affirmative act, but held it was fair and reason-

able to determine support for both children in the same action because support of both children was a single issue under the agreement and Haitian judgment. [J.S., App. A, pp. xii-xiii.] The decision and agreement to let Darwin live in California, support arrearages, and the public agency investigation were not discussed. Two dissenting judges believed there was no purposeful conduct at all because the father only "passively acquiesced in his teenaged daughter's unilateral decision to live in California." [J.S., App. A, p. xvi.]

Dr. Kulko appeals.

Summary of Argument.

The inquiry is whether the relationships between the parties, the litigation, and the forum state furnish the minimum contacts required to make it fair and just to try the child support issues in California. *Shaffer v. Heitner,* Slip Opinion, p. 16; *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). Dr. Kulko's combined activities and decisions, considered in the aggregate, easily meet established criteria for exercising jurisdiction. Restatement (Second), Conflict of Laws, §§24, 27, 39.

Dr. Kulko entered into agreements to have his children raised in California. Those contracts, to be performed in whole or in part in the forum state, provide substantial connections. *McGee v. International Life Ins. Co.,* 355 U.S. 220, 223 (1957); Gorfinkel and Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure,* 21 Hastings L. J. 1163, 1215 (1970).

By sending Ilsa to California to live, and by permitting Darwin to live there with his mother, the father

performed significant acts affecting his parental rights and relationships and linking him to California. *In re Guardianship of Ellick,* 69 Misc.2d 175, 177, 328 N.Y.S.2d 587, 590 (Fam.Ct. 1972); *cf., In re Miller, infra,* 548 P.2d 542. Also, he used a state agency to investigate Darwin's living conditions in California before exercising his authority as custodial parent, and generally invoked the benefits and protections of California by having both children reared there. Further, by failing to pay agreed support, he subjected himself to jurisdiction while making it difficult, if not impossible, for the mother and children to pursue him in New York. These acts, considering the special place children have in the law, and the state's interest in the welfare of its children, supply an adequate nexus. *Hines v. Clendenning,* 465 P.2d 460 (Okla. 1970); *In re Miller,* 86 Wn.2d 712, 548 P.2d 542 (1976).

No relationship is closer than that between parent and child, and the subject matter of this action, custody and support, touches the heart of that relationship. With the mother and children living in California, and with custody to be determined there, as Dr. Kulko concedes, only an absence of connections should defeat jurisdiction.

If Dr. Kulko prevails, a custodial father will be able to relieve himself of the day-to-day responsibilities of raising children and, by the same acts, avoid his support duties.

ARGUMENT.

DR. KULKO SUBJECTED HIMSELF TO JURISDICTION BY CONTRACT; BY A CONTINUOUS COURSE OF ACTIVITIES CAUSING CONSEQUENCES IN CALIFORNIA; AND BY HIS CLOSE RELATIONSHIPS TO THE PARTIES, THE SUBJECT MATTER OF THE LITIGATION, AND THE FORUM STATE.

(1) Several Established Due Process Principles Support Jurisdiction.

The exercise of jurisdiction over Dr. Kulko must be measured by the standards set forth in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and its progeny, *Shaffer v. Heitner,* No. 75-1812 (June 24, 1977), Slip Opinion, p. 24.

International Shoe established the primary test, laying to rest the concept that a defendant must be "present" in the forum state:

> "(D)ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "
>
> *Id.,* at 316.
>
> "Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."
>
> *Id.,* at 317.

The same tests apply to individuals. *Shaffer v. Heitner,* Slip Opinion, p. 16, n. 19.

The reasonableness of exercising jurisdiction is to be determined in each case. *Perkins v. Benguet Mining Co.,* 342 U.S. 437, 445 (1952).

Significant connections may be formed by acts outside the state producing results in the forum state, *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 500 (1971); *International Shoe,* 326 U.S. at 318-319; by "continuing relationships and obligations with citizens of another state," *Travelers Health Assn. v. Virginia,* 339 U.S. 643, 647 (1950); or by enjoying the benefits and protections of the forum state, if the action arises from those activities. *International Shoe,* at 319; *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). Due process protects a defendant from an assertion of jurisdiction if the suit arises from the "unilateral activities" of the plaintiff and the defendant has no "contacts, ties, or relation" to the state at all, *International Shoe,* at 319, but Mrs. Horn certainly did not act unilaterally and Dr. Kulko's performance and non-performance produced results in California, giving him ties to the forum state.

Great weight is given to the relative inconveniences to the parties, *International Shoe,* at 317; *Travelers Health Assn.,* at 648-649, as well as to the manifest interests of the state in the subject of the action, *Travelers Health Assn.,* at 648; *McGee,* at 223, *see,* Mr. Justice Brennan, concurring and dissenting, *Shaffer v. Heitner,* Slip Opinion, p. 4; principles especially significant in this kind of case.

The appropriate measure has been variously described as the presence of "affiliating circumstances," *Hanson*

v. Denckla, at 245-246; "dealings" which make it just to subject a nonresident defendant to local suit, *Shaffer v. Heitner,* Slip Opinion, p. 15, quoting L. Hand, J., *Hutchinson v. Chase & Gilbert,* 45 F.2d 139, 141 (CA2 1930); and activity of a "quality and nature" which provides "minimum contacts" with the forum state. *International Shoe,* at 316-319.

The tests were synthesized in *Shaffer v. Heitner,* Slip Opinion, p. 16: The central concern of the inquiry is the "relationship" among (a) the defendant, (b) the forum, and (c) the litigation.

Hanson v. Denckla, with its language stressing the territorial limitations on state power and the need for presence within the forum state, 357 U.S. at 251, 253, upon which appellant relies so heavily [Brf. A., pp. 12-14], does not produce different results. "(T)he Court in *Hanson* determined that the defendant over which personal jurisdiction was claimed had not committed any acts sufficiently connected to the State to justify jurisdiction under the *International Shoe* standard."[6] *Shaffer v. Heitner,* Slip Opinion, p.16, n. 20.

Jurisdiction over nonresidents is needed in domestic relations situations as in other disputes, actually more

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[6]For further analyses of *Hanson v. Denckla,* see *Phillips v. Anchor Hocking Glass Corp.,* 100 Ariz. 251, 254-259, 413 P.2d 732, 734-737 (1966); *Zerbel v. H. L. Federman & Co.,* 48 Wis.2d 54, 61-63, 179 N.W.2d 872, 876-877 (1970); Hazard, *A General Theory of State-Court Jurisdiction,* 1965 Supreme Court Review 241, 243-244.

Apparently, by his emphasis on the concept of "contacts" requiring physical presence in California at some significant time [Brf. A., pp. 11-12, 14, 17-18 [A. 21-22, 24-26]], and his reliance on the continued "soundness and conceptual structure" of *Pennoyer v. Neff* [Brf. A., pp. 11-12, *cf.*, 17-18], appellant wants to revive the outmoded limitations and fictions so carefully dismantled in *Shaffer v. Heitner.*

so. Comment, *State Court Jurisdiction: The Long-Arm Reaches Domestic Relations Cases,* 6 Texas Tech. L. Rev. 1021, 1023 (1975). It is important to protect children from being stranded without support when parents try to avoid their obligations. *Whitaker v. Whitaker,* 237 Ga. 895, 230 S.E.2d 486 (1976); *Mizner v. Mizner,* 84 Nev. 268, 270-271, 439 P.2d 679, 680-681, *cert. den.,* 393 U.S. 847 (1968); *Mitchim v. Mitchim,* 518 S.W.2d 362, 365-366 (Tex. 1975); *Dillon v. Dillon,* 46 Wis.2d 659, 671, 176 N.W.2d 362, 368 (1970); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases,* 73 Columbia L. Rev. 289 (1973); Comment, *Domestic Relations: The Role of Long Arm Statutes,* 10 Washburn L.J. 487 (1970). A father should not be able to use jurisdiction principles as a shield from his children.

Mrs. Horn contends jurisdiction is founded upon two accepted bases: First, an act or series of acts, including contracts, outside the state causing an effect in the forum state. Restatement (Second), Conflict of Laws, §§27, subd. (1)(i), 37; Reese and Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction,* 44 Iowa L. Rev. 249, 260-261 (1959). Second, other relationships which make the exercise of judicial jurisdiction reasonable, particularly the special relationships between parents, children, and the care and welfare of the children who live in the forum state. Restatement (Second), Conflict of Laws, §§27, subd. (1)(k), 39.

Many of this father's acts, omissions, and relationships, standing alone, provide a jurisdictional basis. In the aggregate, they provide a base much broader than the California Supreme Court deemed necessary.

(2) The Parties, the Forum, and the Litigation Are Naturally Related.

A. The Father's Relationships to the Forum Must Be Considered in the Context of the Special Subject Matter of the Action.

In the case at bar, the nature of the relief sought must be emphasized in balancing the scales. Children have a special place in life which law should reflect, Frankfurter, J., concurring, *May v. Anderson*, 345 U.S. 528, 535-536 (1953), and "family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise." Frankfurter, J., concurring, *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 616 (1947). Whether the father is being accorded fair play and substantial justice "must be considered in context with and cannot be divorced from the nature of the underlying controversy which evoked this litigation. One also must keep in mind that the welfare of the children is the paramount concern, coupled with the secondary interests of the parents and the state in the resolution of this issue." *In re Miller*, 86 Wn.2d 712, 720, 548 P.2d 542, 547 (1976).

Ilsa and Darwin are the beneficiaries of this action, although the parents are the named parties. The law knows no closer relationship than parent to child. Nor could the father have a closer relationship to the litigation: care and support of his children, the very essence of the parent-child relationship. He has strong natural ties to the litigation.

His relationship to his children also gives Dr. Kulko strong ties to the forum where the children are domiciled, as do his support responsibilities, with or without

a written agreement. [A. 10.] Cal. Civ. Code, §§196, 207, 4700. He also knew, or should have known, from the beginning, that custody and support are always subject to modification in the best interests of the children. The Haitian judgment was always subject to establishment, modification, and enforcement somewhere, most likely where his former wife lived, so Mrs. Horn would not be without an enforceable order. Thus, the probability of a suit has always been present.

Dr. Kulko gives a curious twist to the closeness of the relationship when he asks the courts not to "interfere" in his personal dealings with his children and their mother. [Brf. A., pp. 13, 18, 26.] Ultimately, he is saying: "I gave her custody and offered to negotiate support without lawyers. She refused. Now let them fend for themselves. Force them to find some way to pursue me in New York." He is asking the courts to side with him against his children and to enhance his already superior bargaining position. A most unusual request.

These relationships are much closer than those upon which jurisdiction usually rests and they meet the usual balancing tests for determining the reasonableness of exercising jurisdiction. *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 196-197 (CA8 1965); *L. D. Reeder Contractors of Ariz. v. Higgins Industries*, 265 F.2d 768, 773, n. 12 (CA9 1959); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961); Restatement (Second), Conflict of Laws, §§24, 39; Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 75, 83, 85 (1969).

B. The Closely Related Custody and Support Issues Should Be Tried in the Same Action.

Dr. Kulko concedes jurisdiction to adjudicate child custody which is raised in the same complaint. [J.S., App. A, p. iv; App. B, p. xx.] Child custody jurisdiction also could be based upon the ordinary tests.

It is reasonable to adjudicate custody of these children where the mother resides and where one of the siblings has lived for two years. Cal. Civ. Code, §§5152, 5156, 5157, 5163; Unif. Child Custody Juris. Act, §§3, 7, 8, 14 (now adopted in at least 20 states, 3 Family Law Reporter 2685 (Sept. 13, 1977)); *Ferreira v. Ferreira,* 9 Cal.3d 824, 109 Cal.Rptr. 80, 512 P.2d 304 (1973); *Sampsell v. Superior Court,* 32 Cal.2d 763, 197 P.2d 739 (1948); *Clark v. Superior Court,* 73 Cal.App.3d 298, 140 Cal.Rptr. 709 (1977); Restatement (Second), Conflict of Laws, §79. Having acquired the requisite custody jurisdiction, *May v. Anderson,* 345 U.S. 528 (1953), by the ordinary tests, as well as by concession, the courts could justify refusing to litigate child support in the same proceeding only for the strongest of reasons.

Even though Dr. Kulko agreed to a custody change [A. 44], a position on which he now equivocates [A. 30], the court still must review the arrangements and is not bound by any stipulation. *Ford v. Ford,* 371 U.S. 187, 193 (1962); *Black v. Black,* 149 Cal. 224, 86 Pac. 505 (1906); 32 Cal.Jur.3d, Family Law, §234.

In addition, the propriety of awarding child custody to the mother may well depend on whether she can get adequate support for the children. A destitute mother could not care for the children no matter how

loving she might be, and any mother is entitled to an appropriate contribution from the father.

With custody litigation proceeding in California, another suit in New York would only add to efforts, expenses, and emotions. If Dr. Kulko prevails, "divisible" divorce, *Estin v. Estin,* 334 U.S. 547, 549 (1948), will become splintered divorce.

The decisions he relies upon do not require such a result.[7]

Schoch v. Superior Court, 11 Cal.App.3d 1200, 90 Cal.Rptr. 365 (1970) [Brf. A., pp. 17-18, 26], was decided under the predecessor to California Code of Civil Procedure section 410.10. Under it, California did not have jurisdiction unless the defendant was a resident "at the time the cause of action arose." 11 Cal.App.3d at 1203, n. 1, 90 Cal.Rptr. at 366, n. 1. No cause of action arose in California because the nonresident father was paying ordered child support. Child custody was not an issue.

Judd v. Superior Court, 60 Cal.App.3d 38, 131 Cal.Rptr. 246 (1976) [J.S., App. A, pp. vii-x], also involved only child support. The mother, who had full custody, moved to California. The father paid child support as agreed and corresponded, talked to the children by telephone, and visited on a few occasions. "(T)he father had not purposely availed himself of the protections and benefits of the laws of California since he had never had custody of the children and had not sent them to California." [J.S., App. A, p. x.] He was in no way "responsible for his former

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[7]For discussion of appellant's other arguments, please see part I(2) of this brief, above.

wife and his children moving to California." 60 Cal. App.3d at 45, 131 Cal.Rptr. at 249.

In *Titus v. Superior Court,* 23 Cal.App.3d 792, 100 Cal.Rptr. 477 (1972) [J.S., App. A, pp. vii-xi], the nonresident father had legal custody and sent the children to California for summer visitation with the mother's written agreement to return them. She refused to return the children, in breach of the agreement, and filed for custody and support. Support jurisdiction was declined by application of clean hands doctrine. Custody jurisdiction was asserted because the children were physically present, but custody jurisdiction should have been declined because of the mother's unclean hands. *Ferreira v. Ferreira,* 9 Cal.3d 824, 835, n. 10, 109 Cal.Rptr. 80, 87, n. 10, 512 P.2d 304, 311, n. 10. Jurisdiction would be declined now under the Uniform Child Custody Jurisdiction Act. Cal. Civ. Code, §§5152, 5156, 5157.

In any event, Dr. Kulko did not send Ilsa for a temporary visit, but for permanent residence [J.S., App. A, p. xi], and he also decided Darwin should live permanently in California, a decision which obviously affected his parental rights and his relationship to his child. *In re Guardianship of Ellick,* 69 Misc.2d 175, 178, 328 N.Y.S.2d 587, 590 (Fam. Ct. 1972).

The California Supreme Court properly analyzed, distinguished, and limited the holdings of its own lower courts. [J.S., App. A, pp. vii-xi.] There is no reason to override its interpretations. Casual acts and temporary visitation differ from deliberate, permanent changes of custody.

(3) Dr. Kulko's Course of Conduct Deliberately Caused Consequences in California.

Dr. Kulko entered into an agreement with Mrs. Horn, when she was living in California, allowing her to have their two children in her custody part of the year and requiring him to pay her support. In performing her end of the bargain, Mrs. Horn necessarily used California facilities and the protection of its laws. When Ilsa moved there, with her father's consent if not his blessings, she benefited directly from all the services of the state and its laws and tax monies, which directly benefited Dr. Kulko. [J.S., App. A, p. vii.] The same is true of his decision to let Darwin stay in California. Those consequences were foreseeable and intended.

> "(A) nonresident parent who allows his minor child or children to reside in California has by that act purposely availed himself of the benefits and protections of the laws of California to such an extent that absent unusual circumstances or countervailing public policies such act would support personal jurisdiction over the nonresident parent for actions concerning the support of these children." [J.S., App. A, p. vii.]
> See also, J.S., App. A, pp. x-xi.

Dr. Kulko committed several additional specific acts having immediate effects in California and calculated to cause activity there. *Cf., Bernardi Bros., Inc. v. Pride Manufacturing, Inc.,* 427 F.2d 297, 299 (CA 3 1970); Restatement (Second), Conflict of Laws, §37, and Caveat; Unif. Crim. Extradition Act, §6; Cal. Penal Code, §1549.1.

He put Ilsa, then eleven years old, on a plane with a one-way ticket and all of her clothes, returning her twice after visitation. [A. 32.] He investigated the living conditions before letting Darwin stay, contacting a California public agency to conduct the investigation [A. 33], certainly a direct use of California facilities. Although not developed in the record, both children would have needed their school records to enroll in their new school, as well as their medical and dental records, and Darwin's belongings, requiring specific acts by the father in furtherance of his decision to change the custody of the children.

The father contends he merely "acquiesced" when his daughter wanted to live in California. [Brf. A., pp. 6, 16-17, 19.] (Compare his previous position that he "passively submitted" [J.S., p. 18] when his daughter unilaterally "announced her decision" [J.S., p. 22] to live in California.) But the notion that a father is an innocent bystander when an eleven-year old child decides where she will live is startling.

Not only is his proposition novel, it is contrary to law. No minor child can unilaterally decide which parent will have custody. The child's wishes may be considered, though one wonders how much weight will be given to an eleven-year old's opinion, but the final decision is up to the court. *Dintruff v. McGreevy,* 34 N.Y.2d 887, 359 N.Y.S.2d 281, 316 N.E.2d 716 (1974); *In re Marriage of Mehlmauer,* 60 Cal.App.3d 104, 131 Cal.Rptr. 325 (1976).

Further, the custodial parent has responsibility for the well-being of the children, "custody embraces the sum total of parental rights." *Burge v. City and County of San Francisco,* 41 Cal.2d 608, 617, 262 P.2d 6,

12 (1953). An exercise of those rights requires a deliberate decision. Placing the children, both children, with the mother was an act causing consequences in California which subjected him to jurisdiction. *In re Guardianship of Ellick,* 69 Misc.2d 175, 328 N.Y.S. 2d 587 (Fam. Ct. 1972); *In re Miller,* 86 Wn.2d 712, 548 P.2d 542 (1976). After all, the children were not mere merchandise casually placed in the mails as an incidental transaction. They were Dr. Kulko's most solemn responsibility.

His failure to pay the agreed support is significant, too. It obviously caused Mrs. Horn to provide support in California and necessitated further use of that state's protection. Moreover, a nonresident's failure to pay support is an act committed within the state which is a basis for jurisdiction, both criminally, Rev. Unif. Reciprocal Enforcement of Support Act, §5; Cal. Code Civ. Proc., §1660, and civilly, *State ex rel. Nelson v. Nelson,* 298 Minn. 438, 216 N.W.2d 140 (1974); *In re Miller,* 86 Wn.2d 712, 719, 548 P.2d 542, 547; *Poindexter v. Willis,* 23 Ohio Misc. 199, 51 Ohio Ops. 157, 256 N.E.2d 254 (Illinois law).

Beyond doubt, the mother did not act unilaterally, and the father's acts and omissions caused her to invoke the benefits and protections of California laws. He knowingly benefited himself and knowingly benefited his children. *Cf., Hanson v. Denckla,* 357 U.S. at 253. His conduct was purposeful.

Dr. Kulko's position that he could not foresee any results in California [Brf. A., pp. 19-23] is untenable. His allegedly passive role is belied by his conduct. The children's father should not be able to avoid a support order in the children's domicile because he

now pretends to have abdicated his parental duties by passively acquiescing to their wishes. He is directly responsible for the children now living in California. He is subject to this suit.

(4) The Father's Agreements to Have His Children Raised in California and to Pay Support Were Contracts Having Substantial Connections With the State.

The original contract between the mother and the father expressly contemplated the children would be in the mother's custody in California for substantial parts of each year, with child support to be paid year-round. [A. 8-12.] Then the father modified the agreement by deciding Ilsa should live in California and visit him during the summers. He further modified the agreement by deciding it would be best if Darwin lived with his mother. He also impliedly agreed by letter to pay more child support, leaving open only the amount. [A. 32-33, 44.]

Consequently, three voluntary contracts are to be performed in substantial part in California; the original written divorce settlement and two modifications. Cal. Civ. Code, §1698; 1 Witkin, *Summary of Cal. Law* (8th ed. 1973), Contracts, §715, pp. 600-601. Both performance and non-performance had plainly foreseeable consequences in California. The contracts are enforceable in this action.

"It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *McGee v. International Life Ins. Co.*, 355 U.S. at 223. Great weight is given to the consequences of the contract in the forum state.

Travelers Health Assn. v. Virginia, 339 U.S. at 648. If, when the agreement was executed, the defendant could foresee that some or all performance would take place in the forum state, "(t)he cases leave little room for doubt" that the "requisite substantial connection exists and long-arm jurisdiction over an absent defendant may properly be assumed." Gorfinkel and Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 Hastings L. J. 1163, 1215 (1970). The very purpose of these agreements was performance in California.

Dr. Kulko's activities fit many descriptions of dealings sustaining jurisdiction. He acted deliberately, *N. K. Parrish, Inc. v. Schrimscher*, 516 S.W.2d 956, 959 (Tex. 1974), contemplated a continuing relationship with California residents, *Midwest Packaging Corp. v. Oerlikon Plastics, Ltd.*, 279 F.Supp. 816 (S.D. Iowa 1968), actively participated in various decisions, *Controlled Metals, Inc. v. Non-Ferrous Intern. Corp.*, 410 F.Supp. 339, 343 (E.D.Pa. 1976), and knew the mother would perform all of her obligations in California. *W. A. Kraft Corp. v. Terrace On Park, Inc.*, 337 F.Supp. 206, 209 (D.N.J. 1972); *Engineered Prod. v. Cleveland Crane & Engineering*, 262 S.C. 1, 6, 201 S.E.2d 921, 923 (1974).

Weighing his activities as they occurred, in combination, against the background of the subject of the contracts, the contacts are significant. *Cf., Ward v. Formex, Inc.*, 27 Ill.App.3d 22, 325 N.E.2d 812 (1975); *Margaret Watherston, Inc. v. Forman*, 73 Misc.2d 875, 342 N.Y.S.2d 744 (1973); *Proctor & Schwartz, Inc. v. Cleveland Lumber Co.*, 228 Pa.Super. 12, 323 A.2d 11 (1974). These contacts would be

enough in a commercial setting and should be more than enough in these circumstances.

Although the California Supreme Court did not treat this aspect of the parties' dealings, the contractual relationships provide an accepted, independent basis for exercising jurisdiction as to both children.

(5) The State Has a Manifest Interest in the Welfare of Children Residing Within Its Borders and a Special Duty to Protect Them.

One of the primary factors to be weighed is the interest of the forum state in the subject matter of the suit. *McGee v. International Life Ins. Co.*, 355 U.S. at 223; *Travelers Health Assn. v. Virginia*, 339 U.S. at 647-648; *see*, Mr. Justice Brennan, concurring and dissenting, *Shaffer v. Heitner*, Slip Opinion, p. 4. The state's interest in domestic relations litigation involving children is surely as great as its interest in providing a forum for insurance claimants. *Hines v. Clendenning*, 465 P.2d 460, 463 (Okla. 1970); *Tiedman v. Tiedman*, 195 Neb. 15, 20, 236 N.W.2d 807, 810 (1975), if only to protect residents from becoming public charges. *Mizner v. Mizner*, 84 Nev. 268, 270-271, 439 P.2d 679, 680-681, *cert. denied*, 393 U.S. 847 (1968); *Dillon v. Dillon*, 46 Wis.2d 659, 671, 176 N.W.2d 362, 368 (1970); Cal. Code Civ. Proc., §1660 (a nonresident parent may be extradited for failure to support).

Also, since children are at a disadvantage in dealing with adults, Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657, 661-662 (1959), jurisdiction will be asserted to protect children in circumstances where jurisdiction would be declined if only adults

were involved. *Ibid.*; *Cf., Sampsell v. Superior Court*, 32 Cal.2d 763, 777-781, 197 P.2d 739, 748-750. This special interest is expressed in the concept of *parens patriae*: a duty to protect all infants, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *In re Guardianship of Ellick*, 69 Misc.2d 175, 178, 179, 328 N.Y.S.2d 587, 590, 591 (Fam.Ct. 1972); 59 Am. Jur.2d, Parent and Child, §9; 67 C.J.S., Parent and Child, §10; 32 Cal.Jur.3d, Family Law, §177, a duty courts take seriously.

California has a substantial, legitimate interest in the case and considerable deference should be given to its desire to provide a forum.

(6) California, Where the Mother and Children Reside, Is the Just and Convenient Forum.

Another factor to be weighed is the convenience of the forum chosen by the plaintiff-mother. The court must make an "estimate of the inconveniences," *International Shoe*, 326 U.S. at 317, a phrase borrowed from Judge Learned Hand who equated the test to inconvenient forum analysis. *See, L. D. Reeder Contractors of Ariz. v. Higgins Industries*, 265 F.2d 768, 775 (CA9 1959). This Court has taken the same approach. *Cf., McGee v. International Life Ins. Co.*, 355 U.S. at 223-224; *Travelers Health Assn. v. Virginia*, 339 U.S. at 648-649.

The plaintiff's choice of forum should be disturbed only if there are weighty reasons in favor of defendant. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509 (1947); Restatement (Second), Conflict of Laws, §84, comment c. Dr. Kulko could have combined a motion to dismiss for inconvenient forum with his motion

to quash the summons, Cal. Code Civ. Proc., §418.10, subd. (a)(2); Cal. Civ. Code, §5156, but he did not. Hence, there is no reason to consider California particularly inconvenient to him.

Custody is to be tried in California, the children are domiciled there, and the witnesses to the mother's care of the children live there. Likewise, the witnesses to the current needs of the children, particularly any special needs, the standard and style of living, the ability of the mother to contribute to support, the current health of the children and the mother, school records, and virtually all other witnesses are located there. The only evidence to be produced from New York is Dr. Kulko's testimony and his ability to pay support, the latter being primarily documentary evidence. *Cf., Gulf Oil Corp. v. Gilbert, supra,* 330 U.S. at 508-509; *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 443-444, 176 N.E.2d 761, 766-767 (1961).

Another significant consideration, peculiar to support and custody proceedings, is that the court making the orders will have continuing responsibility to modify the provisions if circumstances change in the future. Cal. Civ. Code, §§4600, 4700; N.Y. Dom. Rel. Law, §240. Since the children are in the forum state by the design of both parents, not as transients or as the result of child snatching, preference should be given to California as a forum so determination of future support changes may be had in the state of the children's probable permanent residence. Such a preference is particularly appropriate when future custody and visitation changes will be litigated there.

The expense of taking an entourage to New York, perhaps several times, is significant, *Travelers Health Assn.,* 339 U.S. at 648-649, as is the fact that Dr. Kulko helped choose the forum in which Mrs. Horn must litigate by placing the children with her and failing to pay support. If a father can avoid trial where the children live, he may well force the mother to forego support and make himself judgment-proof; the cost of pursuing him may become greater than the gain, if he can be pursued at all. *Cf., Hines v. Clendenning,* 465 P.2d 460, 463 (Okla. 1970).

Although the usual focus is on the defendant's inconvenience, it is appropriate to give great weight to the convenience to Mrs. Horn of access to California courts. *Cf., Phillips v. Anchor Hocking Glass Corp.,* 100 Ariz. 251, 255, 413 P.2d 732, 734-735; von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 Harv. L. Rev. 1121, 1166-1173 (1966); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 Yale L. J. 289, 312-314 (1956). If Dr. Kulko prevails, he will have sent his children to California and, by the same move, sidestepped his responsibilities, an unconscionable result.

California is the most convenient forum. The judgment should be affirmed.

Conclusion.

Considering the special subject matter of this action, the close relationship of the parties, and the fact the children and the mother reside in California, the father's agreements to have the children raised in California, his parental decisions, his acts in sending them to

California, and his use of California's facilities, form an ample basis for jurisdiction. The state's interests in enforcing support duties and the relative convenience of litigating in California are added reasons to honor the mother's choice of forum.

The judgment should be affirmed and the cause remanded to the Superior Court of California in and for the City and County of San Francisco, No. 701 626, for further proceedings.

Respectfully submitted,

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APPENDIX.

California Code of Civil Procedure.

Chapter 5. Objection to Jurisdiction

§ *418.10 Motion to quash service of summons or to stay or dismiss action; procedure*

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his responsive plead-

ing in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.